Nos. 82-1349 and 82-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,
v.
S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES), *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
EMMA ROSA MASCHER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,
v.
UNITED SCOTTISH INSURANCE CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE RESPONDENTS

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BRIEF FOR THE RESPONDENTS

STATEMENT

1. THE ROLE OF THE FAA IN PRE-EMPTING THE FIELD OF AVIATION

The role of the federal government in civil aviation began in 1926 when President Coolidge signed into law the first Air Commerce Act. This important legislation in-

structed the Secretary of Commerce to foster air commerce; to designate, establish, operate and maintain aids to air navigation, except airports; arrange for research and development to improve such aids; to license pilots; to issue airworthiness certificates for aircraft and major aircraft components; and to investigate accidents.

Prior to that time in 1926 when the government entered the field, aircraft were being manufactured, modified, altered, and repaired by private persons in the United States. Prior to the passage of the Air Commerce Act of 1926, no government approval or involvement was required for any of these functions. Only after December 31, 1926, the effective date of the new legislation, did the government commence the licensing and certification of airmen and mechanics. On March 29, 1927, the government began the certification of new aircraft by issuing its first aircraft type certificate number one. Prior to that date, the function of inspecting new aircraft for airworthiness was carried out by private persons.

On December 31, 1930, the government first passed regulations for aircraft components and accessories; and shortly thereafter, beginning in January of 1931, the first regulations were enacted involving alteration and repairs to license aircraft. Again, prior to the passage of these regulations by the government, all inspections, manufacture, repair, and alteration were done under the aegis of private parties. These private parties were allowed to do whatever they pleased with respect to aircraft or to their operation.

The role of the United States in pre-empting the field of aviation with regard to the inspection and certification of aircraft to assure airworthiness is similar to the takeover of the control tower operations in the United States. The procedure for the Federal Government's operation of control towers was first established on October 17, 1941; however, the takeover of the operation of towers did not begin until November 1, 1941, and approximately three

years later there were only eight control towers that were then under the operational responsibility of the Civil Aeronautics Administration.

After the government had taken over the role of inspecting new aircraft and alterations and modifications to existing aircraft, it certificated not only the mechanics who performed the actual physical work of maintenance, inspection, repair or modification, but it also certificated and delegated authority to other persons who would perform responsibilities for an inspection and designated those persons to act for the Administrator.

The pre-emption of the field by the federal government was complete with the passage of the Federal Aviation Act of 1958. The Civil Aeronautics Board retained responsibility for economic regulation of the air carriers and for accident investigation, but the mandate to promote safety in air commerce was assumed by the FAA. The role of the government is set forth in the FAA Historical Fact Book, a publication of the Department of Transportation of which the District Court below has taken judicial notice and a copy of which has been lodged with the Clerk of this Court.

The Federal Aviation Act (49 U.S.C. § 1301 *et seq.*), mandates that the FAA promote safety of flight "by prescribing minimum standards governing the design, materials, workmanship, construction and performance of aircraft. . . ." Under the Federal Aviation Act, the Federal Aviation Administration is statutorily empowered to issue certificates for the development and production of aircraft, engines and propellers (49 U.S.C. § 1423) and to issue regulations establishing minimum safety standards for the issuance of such certificates. (49 U.S.C. § 1423(a)(1)). Part 21 of the Federal Aviation Regulations (FARs) specifies in numerous subparts the certification procedures for aircraft and parts (14 C.F.R. § 21.1 *et seq.*).

The role of the FAA is to set these standards and carry out the procedures for certificating the airworthiness of aircraft. The FAA regulations are mandatory and aircraft may not be certificated without proper compliance with the Federal Aviation Regulations and inspection by the FAA. The FAA certification process varies depending upon which type of certificate is required.

Before certificating new aircraft, the manufacturer must obtain a "type certificate." The FAA must approve the design by checking design drawings for compliance with minimum safety standards. (49 U.S.C. 1423(a); 14 C.F.R. 21.11-21.53). Pursuant to 14 C.F.R. 21.33, inspection of the aircraft is required in order to assure "compliance with the applicable airworthiness and aircraft noise requirements." Additionally, 14 C.F.R. 21.147 requires the Administrator of the FAA be allowed to inspect and to make any test necessary to determine compliance with the applicable regulations in the code.

A second type of certificate issued more frequently by the FAA is called a "supplemental type certificate." The government, in its brief, failed to mention that this type of certificate is extremely relevant since this is the type of certificate issued in the *United Scottish Insurance* case. This certificate is issued pursuant to 14 C.F.R. 21.133, and is an additional certificate that is required when aircraft are altered. 14 C.F.R. 21.113 states that, "[a]ny person who alters a product by introducing a major change in type design . . . shall apply to the administrator for a supplemental type certificate. . . ." Again, each applicant for a "supplemental type certificate" must show that the altered product meets applicable airworthiness standards and *must* meet Sections 21.33 and 21.53 requirements for inspection and testing. Inspection is mandatory with regards to determining compliance with the applicable Federal Aviation Regulations.

The deposition of Charles H. McMillan, former Assistant Chief of Engineering and Manufacturing for the

FAA, taken on February 5, 1973, was received into evidence on January 30, 1975 at the District Court trial. McMillan testified in his deposition that the "supplemental type certificate," such as the one issued in *United Scottish*, would have been *issued only upon a finding of compliance with regulations and inspections.* (Jt.App. 281). Mr. McMillan further stated that *in order to comply* with the existing regulations, *an inspection of the installation would have to be made.* (Jt.App. 282). *United Scottish* does not involve certification of a "prototype modification." The type of alteration made was a one-time alteration which required both examination of the drawings of the proposed change *and physical inspection* to determine if compliance was made. (Jt.App. 281-282). In *United Scottish Insurance* the trial court found that the FAR's required that an FAA inspector inspect the heater installation. (FF 7).[1]

Another type of certificate issued by the FAA is the Class I Export Certificate of Airworthiness. This certificate is relevant to the *Varig* and *Mascher* cases but not to the *United Scottish* case.

2. THE UNITED SCOTTISH INSURANCE CASE

a. *Statement of the Facts*

On October 8, 1968, a DeHavilland Dove aircraft, owned and operated by respondent, John Dowdle, caught fire in midair, crashed and burned in Las Vegas, Nevada. The pilot, co-pilot Weaver, and passengers Fleming and Cearley were killed. The fire, crash and deaths were caused by a faulty fuel line to a gasoline fueled heater located in a compartment below and forward of the pilot's compartment. The heater and fuel line were negligently installed by an aircraft repair station in Dallas, Texas in 1965.

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[1] Findings of Fact, First Trial, 1975. (See Jt. App. 207).

The "supplemental type certificate" provided in 14 C.F.R. 21.13, *et seq.* is the only type of certificate relevant to the *United Scottish* case. 14 C.F.R. 21.113 states that a "supplemental type certificate" must be obtained when modifying aircraft. In this case, the installation of the heater fuel line was a *one-time modification*, and as such, no plans or specifications were provided to the FAA. The only "specifications" forwarded to the FAA were Polaroid pictures taken of the "as built" installation. Under these circumstances it would have been mandatory that an FAA inspector inspect the installation and approve the aircraft for return to service. (Jt.App. 282-283). In spite of the data provided and the negligent inspection, the DeHavilland Dove was certificated as airworthy.

The trial court found that the fuel line was in violation of 14 C.F.R. 23.993. (See Jt.App. 298). The fuel line was installed by utilizing a copper fuel line mounted in the belly of the aircraft that had been part of a priming system which was no longer in use. (FF 11).[2] A stainless steel fuel line was coupled to the copper line with a stainless steel junction block. This line was unsupported or improperly supported for a run of approximately three and one-half feet. (FF 15).[3] It was placed within 1/16" of a stainless steel bolt and nut which could cause a rupture in the line. (FF 17).[4] The stainless steel line was free to vibrate with a fore and aft motion of approximately three inches from center in each direction and an additional horizontal motion along the face of the sloping bulkhead. This vibrational excursion was greatly in excess of that permitted by Federal Aviation

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[2] Findings of Fact, First Trial, 1975. (See Jt. App. 207).

[3] Findings of Fact, First Trial, 1975. (See Jt. App. 208).

[4] Findings of Fact, First Trial, 1975. (See Jt. App. 208).

Regulations, and could have been eliminated by the proper use of clamps. (FF 19).[5]

The heater installation exhibited numerous design deficiencies which should have alerted any reasonably competent FAA inspector to the fact that the overall quality of the design and fabrication was not consistent with FAA regulations and standards (FF 21).[6] The heater installation was unairworthy. (FF 22).[7] The fire was caused by an escape of fuel from the heater fuel line because of the failure of that line along or just below the forward wall of the sloping bulkhead due to metal fatigue or chaffing caused by excessive vibrations of the fuel line. (FF 25, 26).[8]

After the heater line was installed along the sloping bulkhead separating the forward baggage compartment and the afterpart of the aircraft, an aluminum skin was placed over this bulkhead. The line was, therefore, not visible to subsequent mechanics or inspectors and subsequent inspections did not require the removal of this skin. It is uneconomical, unreasonable and highly unfeasible for an owner of an aircraft, inspected and certified by the Federal Aviation Administration, to take down the entire airplane and inspect it completely at each later inspection. Subsequent inspections are done only to the extent required by the Federal Air Regulations. Although the United States continues to suggest that such inspections took place, there is here no finding whatsoever that those inspections altered or modified the aircraft in any way or that they contributed in any way to the accident and certainly not that they were such an independent intervening cause of the accident so

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[5] Findings of Fact, First Trial, 1975. (See Jt. App. 208-209).

[6] Findings of Fact, First Trial, 1975. (See Jt. App. 209).

[7] Findings of Fact, First Trial, 1975. (See Jt. App. 209).

[8] Findings of Fact, First Trial, 1975. (See Jt. App. 210).

as to relieve the United States from the liability for the negligence of the FAA inspector.

If the FAA inspector had properly inspected the heater installation in accordance with FAA regulations, the aircraft repair station would have been required to either remove the installation because it was unairworthy or to modify the installation to correct the excessive vibration of the fuel line, use of dissimilar metals and other defects so as to make the installation airworthy. In either case, the accident at issue herein would not have occurred if a non-negligent, proper inspection had been made. (FF 27).[9] The negligence of the FAA inspector was a proximate cause of the inflight fire, crash and death of plaintiffs' decedents. (FF 29).[10]

b. *The First Trial and Appeal*

Five lawsuits were filed as a result of the crash of the DeHavilland Dove. Three suits were for wrongful death, one suit for property damage and a subrogation claim made by the insurance companies. The trial court rendered judgment for respondents.

The District Court found that the heater installation was unairworthy and, as such, should have alerted any reasonably competent FAA inspector to the fact that the quality of the heater installation was not consistent with FAA regulations. (FF 21).[11] The Court further found that the government was negligent in certifying the installation in that the installation did not comply with its own regulations.

The government appealed and the Court of Appeals remanded the case to the District Court to decide the is-

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[9] Findings of Fact, First Trial, 1975. (See Jt. App. 210).

[10] Findings of Fact, First Trial, 1975. (See Jt. App. 210).

[11] Findings of Fact, First Trial, 1975. (See Jt. App. 209).

sue of whether the evidence was sufficient to support a finding of liability under the Good Samaritan Doctrine.

c. *The District Court's Decision on Remand*

After consideration of the issues of whether California had adopted a Good Samaritan rule and if so, whether the plaintiffs' cases satisfied the rules as formulated by the state, the District Court affirmed the judgment in plaintiffs' favor. (82-1350 Pet. Cert. App. B, 8a-9a). In applying California law, which follows the Restatement view, the judge analyzed the Restatement as set forth in Sections 323 and 324A of the RESTATEMENT (SECOND) OF TORTS (1965).[12]

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[12] RESTATEMENT (SECOND) OF TORTS, Section 323 (1965) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

RESTATEMENT (SECOND) OF TORTS, Section 324A (1965) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The court then determined that plaintiffs had demonstrated either that the failure of the government to exercise reasonable care in the heater inspection increased the risk of harm to plaintiffs or that plaintiffs suffered harm because of their reliance on the inspection. (82-1350 Pet. Cert. App. B, 13a). While the court was reluctant to conclude that plaintiffs' action fell within Section 323(a), it determined that plaintiffs had satisfied Section 323(b) and Section 324A.

d. *The Court of Appeals' Decision*

The Court of Appeals upheld the District Court's analysis of performance of service and reliance under the Good Samaritan Doctrine and stated that it was "free from error." (82-1350 Pet. Cert. App. A, 4a).

In summary, the Court noted "[T]he careful performance of aircraft inspections is the essence of the government's duty, once the inspections are undertaken. *In re Air Crash Disaster Near Silver Plume, Colorado*, 445 F. Supp. 384 (D. Kan. 1977)." (82-1350 Pet. Cert. App. A, 4a).

The Court affirmed the District Court's finding that the misrepresentation exception to the FTCA pursuant to 28 U.S.C. § 2680(h) did not apply.[13] The Court of

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[13] 28 U.S.C. Section 2680(h) provides:

> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

Appeals held that the basis of plaintiffs' claim was "not the misrepresentation or misinformation contained in the certificate, but the negligence of the FAA's inspection on which the airworthiness certificate was issued." (82-1350 Pet. Cert. App. A, 4a). Citing *Silver Plume*, *supra* at 409, and *Neal v. Bergland*, 646 F.2d 1178, 1183-84 (6th Cir. 1981), *aff'd sub nom. Block v. Neal*, 103 S.Ct. 1089 (1983), the court further noted that it was the inspection undertaken to protect travelers, which if negligently performed, gave rise to the very dangers the inspection was intended to prevent and not reliance on misinformation contained in the certificate. (82-1350 Pet. Cert. App. A, 4a). It was upon this negligent inspection that the court based liability.

Moreover, the court firmly rejected the government's assertion that certificating for airworthiness falls within its discretionary function and is, therefore, exempted pursuant to 28 U.S.C. § 2680(a).[14] Citing *Dalehite v. United States*, 346 U.S. 15 (1953), the Court of Appeals stated:

> All aircraft must comply with F.A.A. requirements in order to be certified as airworthy and thereafter placed in operation. F.A.A. officials enforce the requirements by inspecting the aircraft, but cannot in any way change or waive safety requirements. *Because no room for policy judgment or decision exists, a discretionary function is not being performed*, and the trial court correctly refused to protect the gov-

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[14] 28 U.S.C. Section 2680(a) provides:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

> ernment under the discretionary function clause. (Emphasis added).

(82-1350 Pet. Cert. App. A, 5a-6a).

The *United Scottish Insurance Co.* case was affirmed and, the Court of Appeals reversed the *Varig Airlines* and *Mascher* cases.

In the *Varig* and *Mascher* cases the Court of Appeals found that the California Good Samaritan rule would permit recovery against one who negligently inspected an aircraft for compliance with a federal regulation and that neither the misrepresentation exception, 28 U.S.C. § 2680(h), or the discretionary function exception, 28 U.S.C. § 2680(a), would apply on the facts of these cases. (82-1349 Pet. Cert. (Varig) App. A, 1a-7a).

The Court of Appeals reasoned that under the Good Samaritan Doctrine as set forth in Sections 323 and 324A of the RESTATEMENT (SECOND) OF TORTS (1965), the United States could be held liable because it had undertaken to perform the "service" of inspection and certification of all civilian aircraft. The Court stated that the United States, through the FAA, had voluntarily undertaken the inspection and certification of all civilian aircraft and that the Federal Aviation Act of 1958, 49 U.S.C. § 1301, *et seq.* requires the FAA "[t]o promote safety of flight of civil aircraft in air commerce" and to perform its duties "[i]n such a manner as will best tend to reduce or eliminate the possibility, or recurrence of accidents in air transportation. . . ." 49 U.S.C. § 1421. The act provides for *mandatory* certification procedure, 49 U.S.C. § 1423, and the FAA established design criteria that every aircraft must meet before being certified for flight. (82-1349 Pet. Cert. (Varig) App. A, 15a). The Court further stated:

> Members of the flying public may not know the specific contents of F.A.A. regulations. There is

> general knowledge, however, that regulations designed to insure optimum safety exist and that the United States inspects each aircraft for compliance. The public knows that the government "grounds" aircraft until questions about safety are resolved. The United States should expect that members of the public will rely on the proper performance by the F.A.A. of its duty to inspect and certify. Under California law, a private person inspecting and certifying aircraft for airworthiness would be liable for negligent inspection under that state's good samaritan rule. It follows that the United States also falls within the rule. Even without reference to the good samaritan rule, we have indicated that an action against the government will lie in a negligent inspection and certification case. *Arney v. United States*, 479 F.2d 653, 661 (9th Cir. 1973).

(82-1349 Pet. Cert. (Varig) App. A, 5a).

The Court also rejected the government's contention that under this ruling, it would be liable for every accident resulting from an activity subject to government safety regulation. The Court of Appeals stated that the United States could only be liable when injury resulted from negligent performance of its duty. The voluntary undertaking to inspect and certificate gives rise to a duty to inspect and certify with reasonable care. (82-1349 Pet. Cert. (Varig) App. A, 6a).

SUMMARY OF ARGUMENT

I.

The battle over whether an actionable duty arises from a violation of the Federal Aviation Act of 1958, and its predecessors, and the regulations promulgated by the Federal Aviation Agency to carry out the terms of the Acts, has been hard fought on many fronts. After the United States waived its immunity from liability in tort

in 1946 with the passage of the Federal Tort Claims Act (hereinafter FTCA), the government has defended many suits for injuries arising from aviation accidents. Initially, the United States relied on the defense that no actionable duty was owed to the claimants or to their decedents, but only to the public at large. This argument was rejected and the government was not allowed to shield itself from liability.

The battle presently being waged is over the interpretation of the provisions in the FTCA which state whether the United States shall be liable for the negligent acts of its employees "under the circumstances where the United States, if a private person, would be liable to the claimant" and "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §§ 1346(b), 2674 (1976).

A line of defense asserted by the United States is that the FAA cannot be held liable under the Good Samaritan Doctrine because the United States did not perform a necessary service for respondents but was acting in a regulatory capacity. It also asserts that respondents did not and could not reasonably rely on the FAA's inspections and certifications in these cases. The issue of whether the government, in inspecting aircraft, is acting in its regulatory capacity was decided by the court in *Arney v. United States*, 479 F.2d 653 (9th Cir. 1973). Here, even though reliance is not a necessary element it was specifically found by the trial court.

The United States is also attempting to resurrect a third line of defense and contends the discretionary function exclusion of the FTCA bars recovery. In one confrontation after another, the courts have held that negligent acts of the government such as we have here are operational rather than discretionary.

Finally, the United States has retreated, regrouped, and begun asserting another major defense in negligent

inspection cases, the misrepresentation exclusion to the FTCA. Again the courts have disagreed and a case by case analysis of the decisions, particularly the recent case *Block v. Neal*, 103 S. Ct. 1089 (1983), is set forth in section IV of this brief.

ARGUMENT

I. THE FEDERAL AVIATION REGULATIONS PROMULGATED BY THE FEDERAL AVIATION ADMINISTRATION SPECIFICALLY APPLY TO PRIVATE PERSONS AS WELL AS TO FEDERAL GOVERNMENT EMPLOYEES

The reasoning of the government is circular in nature. It asserts that its activity falls within a regulatory function of the government and since this activity falls within a regulatory function of the government, it is not an activity that could be carried out by private persons. Therefore, since no private person could be held for this activity the United States cannot be held liable either. Yet, in its brief, the United States acknowledges that Designated Engineering Representatives (DERs), *private persons* assisting the FAA, do the majority of the inspection and review of designs for certification. Likewise, almost all of the 100 hour, periodic and annual inspections of both private and air carrier aircraft are done by private mechanics licensed for that purpose by the FAA. It, therefore, appears that private individuals do carry out inspections and without argument are liable in tort if they do so negligently. It is true that the government's reasoning might apply to the promulgation of regulations, but we are not complaining about the failure of the United States to pass proper regulations, more stringent regulations or any regulations. The sole claim is that an FAA employee charged with the day-to-day duty of carrying out regulations properly promulgated was negligent in doing so.

It has long been the law of California that a person who is negligent in failing to properly inspect machinery may be held liable to individuals injured as a result of that negligence. See *Dahms v. General Elevator Co.*, 214 Cal. 733 (1932); *Sheward v. Virtue*, 20 Cal.2d 410, 413 (1942).

The Court of Appeals concluded that courts may not determine governmental liability without considering the liability of a private person in "like circumstances" pursuant to relevant state law. The District Court in *United Scottish* conducted an extensive trial and found that prior to the passage of Federal legislation all inspections were conducted by private persons and most inspections still are.

The Court of Appeals stated that in certifying and inspecting aircraft, the United States has no interest of its own to protect. The Court noted that the government itself acknowledges the FAA's activities are performed for the public as a whole. When voluntarily performing activities solely for the safety of the public, the FAA performs a service for another. See *Arney v. United States*, *supra*. (82-1350 Pet. Cert. App. A, 3a; 82-1349 Pet. Cert. (Varig) App. A, 5a).

Prior to the government entering the aviation field in 1926 with the passage of the first Air Commerce Act, aircraft were being manufactured, modified, altered, repaired and inspected by private persons in the United States. As in all other fields, they were liable for negligence in any one of those activities to anyone injured by such negligence. The role of the United States in preempting the field of aviation with regard to the inspection and certification of aircraft is similar to the takeover of the control tower operations by the United States. The question as to whether or not the United States could be held liable for the negligence of its employees in operating control towers now appears clear. But, in the early cases the United States insisted that its

tower operators performed governmental functions of a regulatory nature, that no private individual had such power of regulation, and therefore, the Federal Torts Claims Act did not permit suit based on negligent performance of their duties. Such contentions have uniformly been rejected by the courts in the control tower situation. *Eastern Airlines v. Union Trust Company*, 221 F.2d 62 (D.C. 1955), *aff'd sub nom. United States v. Union Trust Company*, 350 U.S. 907 (1955); *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227 (2nd Cir. 1967). Here, as in the air controller cases, the United States has taken over voluntarily a function which had previously been conducted by private persons. In fact, unlike the air controller cases, here the functions are still carried on in great part by private persons.

The government having voluntarily assumed a duty, the breach of which would create liability on a private person, is liable when one of its employees negligently fails to carry out that duty. See *Silver Plume, supra.* Those cases cited by the United States, such as *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981), do not hold to the contrary but merely hold that there has been a failure of proof of one of the elements necessary to hold the government for a Good Samaritan assumption of duty and breach thereof. In the *Raymer* case, for example, there was a failure to prove reliance. In the instant cases reliance on FAA inspections was specifically found by the courts.

The Court of Appeals' interpretation of private person liability is consistent with that of this Court in *Indian Towing Company v. United States*, 350 U.S. 61, 64 (1955), where the FTCA was construed as rendering the United States liable in tort as a private individual would be under like circumstances even though private persons do not now maintain light houses. In these cases the issue is not negligent licensing or certification, but negligent inspection by an FAA inspector. Clearly, pri-

vate persons in many different situations conduct inspections of products, premises, and activities. In the area of products liability, manufacturers of products ranging from airplanes to children's toys have the affirmative duty to inspect their products before those products are placed on the market. See *Sheward v. Virtue, supra.* Retailers, owners of buildings and contractors conducting hazardous activities have affirmative duties to inspect the product or the area and are held liable for failure to do so where injury results. See *Dahms v. General Elevator, supra.*

In *Gibbs v. United States,* 251 F. Supp. 391, 400 (E.D. Tenn. 1965), the court interpreted the private person requirement as follows:

> Having decided to enter the broad field of the regulation of the flight and repair and modifications of the aircraft and licensing of pilots, the Government becomes responsible for the care with which those activities are conducted. *It may no longer take refuge behind the distinction between proprietary and governmental functions.* But, the Government nevertheless does not become an insurer. Its liability is subject to the same requirements of negligence and causation as would affect the liability of a private person in the same circumstances. (Emphasis added).

It is clear from the cases that private persons may be liable for violations of duties imposed by the Federal Aviation Act of 1958 and the regulations promulgated thereunder.

For example, in *Gabel v. Hughes Air Corp.,* 350 F. Supp. 612 (C.D. Cal. 1972), the court asserted jurisdiction over Hughes Airwest, a private corporation, precisely because their liability was predicated on violations of the FARs.

In *Gatenby v. Altoona Aviation Corp.,* 407 F.2d 443 (3d Cir. 1968), the issue was whether the pilot was liable

for violating FARs relating to visual flight regulations, and the Third Circuit affirmed the judgment for the plaintiffs. Again, the government was not a party, and liability based on a violation of the FARs was found against a private person. Other courts which have based private liability on a violation of the FARs include the Nebraska Supreme Court in *Lock v. Packard Flying Services, Inc.*, 185 Neb. 71 (1970), and *Bibler v. Young*, 492 F.2d 1351 (1974).

A recent case to affirm the duty of care imposed by the FARs is *Delta Airlines, Inc. v. United States*, 561 F.2d 381, 389 (1st Cir. 1977). Liability of the defendant was premised upon the undertaking to provide services not otherwise required which were not performed with due care. There was no finding or analysis of the private person requirement of the FTCA. The controller cases are not distinguishable on either the reliance issue or otherwise as discussed below.

It is well established that an actionable duty arises from a violation of the Federal Aviation Act of 1958 and the regulations promulgated thereunder. Such actionable duty should apply to the government as well as to private parties.

II. THE UNITED STATES IS LIABLE UNDER CALIFORNIA'S GOOD SAMARITAN RULE FOR NEGLIGENCE IN THE FAA INSPECTIONS BECAUSE OF INCREASED RISK OF HARM AND ASSUMPTION OF DUTIES OWED BY OTHERS

1. *The FAA's Negligence in Undertaking to Inspect the Aircraft Increased the Risk of Harm to Respondents*

California has adopted the Restatement view as set in Sections 323 and 324A of the RESTATEMENT (SECOND) OF TORTS (1965).[15] "Although an individual need do

[15] See n.12, *supra*.

nothing to rescue another from a peril not of that individual's own making, *he who undertakes to do an act must do it with due care.*" (Emphasis added). *Brockett v. Kitchen Boyd Motor Co.*, 264 Cal.App.2d 69, 71 (1968). Where one volunteers to do an act, however gratuitous, one must use reasonable care in the performance of the act once it has been undertaken. If the act is done negligently, there is liability. *Coffee v. McDonnell-Douglas Corp.*, 8 Cal.3d 551, 557 (1972); *Schwartz v. Helms Bakery, Ltd.*, 67 Cal.2d 232, 238 (1967); *Keene v. Wiggins*, 69 Cal.App.3d 308, 316 n.4 (1977).

Coffee v. McDonnell-Douglas Corp., supra, is directly on point. There the company, as a matter of corporate policy, required each of its prospective employees to undergo a physical examination to ensure that he was physically fit. The California Supreme Court held that where the company voluntarily assumed the duty of medically examining possible employees to determine fitness, it would be liable to those persons when it negligently performed the medical examination. Clearly, if the FAA voluntarily assumes the duty of examining and inspecting aircraft to determine their airworthiness, it will be liable for injury where it negligently performs that inspection.

The government contends that in order to satisfy the Good Samaritan Doctrine, it must be shown that the purpose of the action was to render a direct service to the person who was harmed, or to persons of that class. (82-1350 Pet. Cert., 30). However, the RESTATEMENT (SECOND) OF TORTS and the cases are to the contrary.

In *Moyer v. Martin Marietta Corp.*, 481 F.2d 585, 598 (6th Cir. 1973) the United States was held liable for approving the plans for a defective ejection system which led to a fatality. In this case, the government not only approved plans but negligently inspected the actual defective heater. The trial court reasoned that without the government's negligence, there would not have been a

heater in the aircraft and the aircraft, would not have crashed. Therefore, there was also evidence sufficient to support a finding of liability under the test of the Restatement, Section 323.

In *Raymer v. United States*, 660 F.2d 1136, 1140 (1981), the Government relied upon an argument similar to the one in the present action. It argued that an inspection done by the Bureau of Mines Department of Interior was an activity which was "uniquely governmental" in scope and, therefore, not within the Good Samaritan Doctrine.

The *Raymer* Court citing *Indian Towing Co. v. United States*, 350 U.S. 61, 67 (1955), flatly rejected the government's contention.

> [I]t is not determinative that private individuals do not engage in regulatory inspection and enforcement activities. *If there are similar activities whose negligent performance by a private individual under like circumstances results in liability under applicable state law, a cause of action exists under the Federal Tort Claims Act.* (Emphasis added).

Thus, the Government may not avoid liability in this case where its negligent inspection would also expose a private person to liability if such "similar activity" was negligently performed.

Although the *Raymer* court did not find liability against the United States, its discussion of the Good Samaritan Doctrine as it pertains to negligent inspection by the United States is wholly consistent with that of the trial court in *United Scottish* which held that the plaintiffs had satisfied the requirements of RESTATEMENT, Section 323(b).

The trial court also held that the plaintiffs satisfied the requirements of Section 324A. The Good Samaritan rule as set forth in Section 324A of the RESTATEMENT (SECOND) OF TORTS (1965) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

The facts of this case bring it within all three of these alternative paths to liability. The United States rendered services to the installer of the heater and to the owner of the aircraft. The installer owed a duty to the owner to protect the aircraft and its occupants from harm; and the owner, in turn, owed a duty to protect the occupants from harm, each by furnishing an airworthy airplane.

Placing the heater and its associated defective fuel line in the aircraft increased the risk of harm to the aircraft and its occupants to such a degree that they all were destroyed or killed. Such alteration required design, actual installation, and inspection. The government inspector negligently carried out the latter part of this alteration and, with the installer, contributed to increasing the risk of harm, bringing this case squarely within the provisions of § 324A(a).

The Government, by undertaking the duty to inspect, one of the duties owed by the installer to all subsequent users of the aircraft, has brought itself precisely within the provisions of § 324A(b) and because of the negligence of the Federal Aviation Administration inspector is subject to liability for the resulting deaths and harm, as the

installer would have been if the Government had not preempted the activity.

Reliance by the decedents herein is not an element of either § 324A(a) or (b), and liability of the government would attach even without the clear finding herein of reliance by the decedents.

Liability also attaches under 324A(c) whether the reliance upon the careful performance of a gratuitous undertaking is by the person or persons to whom the services are rendered *or* by the third person or persons who are to be protected. Thus, reliance by the installer of the heater or the owner of the aircraft is sufficient to satisfy the rule even without the finding by the District Court that there was reliance by the passengers and crew of the aircraft.

Had private industry been left to regulate itself, as was the case prior to government involvement, this type of catastrophic accident probably would not have occurred. The United States has undertaken to regulate and control aviation, and as a good samaritan, must carry out its undertaking in a *non-negligent* manner. The government has shown that its purpose is to render a direct or indirect service to the public; and as such, the Good Samaritan Doctrine is applicable.

2. *Respondents Relied on the FAA's Certification and Inspections in These Cases*

Much of the testimony presented by respondents on remand to the District Court went to the issue of reliance by the owners, the mechanics, respondents, the passengers, the pilots, the FAA inspectors performing subsequent inspections, the aviation industry generally, and the general air-traveling public. The items of which the District Court took judicial notice, including the provisions of the Federal Aviation Act itself which stress the promotion of safety, evidence a comprehensive scheme

by the FAA to do everything possible to properly determine which aircraft are airworthy and which are not. It is not only the pre-emption of the entire field of aviation that has created the general reliance by everyone concerned in aviation, it is the outstanding success the FAA has enjoyed in publicizing its role in air commerce.[16]

The Court in *Arney v. United States, supra*, recognized that the government may be liable for negligent inspection of aircraft. In *Gibbs v. United States, supra* at 399, the District Court in Tennessee, without discussion of the applicable state law, found liability would exist for negligent inspection had that negligence been found to be the proximate cause of the accident. In *Moyer v. Martin Marietta Corp., supra* at 598, the Court recognized the United States could be liable for acceptance of an ejection system which is negligently designed and constructed posing a safety hazard to the individual operating the aircraft. In *In re Silver Plume, supra* at 408-9, the District Court found that because the FAA had preempted and assumed the duty of inspecting aircraft, the government would be liable for a negligently performed inspection where that negligence is the proximate cause of the passengers' injuries.

All the preceding cases provide a foundation which recognized that where proper evidence of reliance upon the inspection is presented, the neglignce of the FAA inspectors will impose liability upon the United States. The Court of Appeals agreed with the District Court's decision in this case that evidence of reliance was sufficient. (82-1350 Pet. Cert. App. A, 12a-13a; 82-1349 Pet. Cert. (Varig) App. A, 4a-5a).

Under California law, private persons are liable for the negligent performance of services undertaken even

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[16] See Federal Aviation Administration, *World*, January, 1981. (U.S. Department of Transportation). A copy has been lodged with the Clerk of this Court.

gratuitously which they should recognize as necessary for the protection of the other person or party where the harm is suffered because of the other's reliance on the undertaking. Reliance was abundantly shown in the evidence presented on remand.

It is absurd for the government to argue that the respondents could not rely on the FAA when the FAA, in its own publication, suggests that it will issue "what amounts to a warranty" over and above the warranty offered by the manufacturer before aircraft can go into passenger service.[17]

Respondents have shown that the United States would be liable as a private person under the Good Samaritan Doctrine in that the respondents have relied on the government to perform its duties of regulating and certificating in a non-negligent manner. Furthermore, the FAA expects the public to rely and concludes that the respondents and the public have confidence in their ability to carry out these responsibilities.

III. THE DISCRETIONARY FUNCTION EXCEPTION TO THE FTCA DOES NOT PROTECT THE GOVERNMENT FROM LIABILITY FOR OPERATIONAL ERRORS SUCH AS NEGLIGENT INSPECTION

Although the government on the first appeal of this case in 1977, abandoned any reliance on the discretionary function exception to the FTCA, it now attempts to resurrect that long dead issue. The government correctly states that in the abstract the discretionary function exception to the Federal Tort Claims Act precludes governmental liability for claims "based upon the exercise or performance or the failure to exercise or preform a discretionary function or duty. . . ." 28 U.S.C. § 2680(a).

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[17] Id.

However, this exception clearly does not apply to the facts of these cases.

The discretionary function exemption was designed to preclude tort claims arising from decisions by executives or administrators when such decisions require policy choices. *Dalehite v. United States*, 346 U.S. 15, 35-6 (1953). However, the inspection and certification process employed by the FAA requires FAA inspectors to follow FAA safety regulations to ensure compliance. Aircraft must comply with the FAA regulations, or they *may not* be certified. There is no room for policy decisions after the FAA has undertaken to prescribe rules and regulations. Those rules and regulations create a duty for aviation inspectors that cannot logically be included under the definition of discretionary function.

Air controller cases are among the cases that distinguish policy decisions from operational tasks. *Eastern Airlines, Inc. v. United Trust Co.*, 221 F.2d 62 (D.C. Cir. 1955); *United States v. Furumizo*, 381 F.2d 965 (9th Cir. 1967); *Ingham v. Eastern Airlines, Inc.*, 373 F.2d 227 (2d Cir. 1967); *Stork v. United States*, 430 F.2d 1104 (9th Cir. 1970). A task is discretionary if it involves choice, judgment, planning or policy decisions. The FAA's duty to respondents involved enforcement of mandatory regulations at the operational level. The FAA inspector was required to inspect the aircraft pursuant to set standards and regulations. Any deviance from these standards is negligence at the operational, not the planning level. The inspector cannot in any way change or waive safety requirements. (82-1350 Pet. Cert. App. A, 5a-6a; 82-1349 Pet. Cert. (Varig) App. A, 6a-7a).

In *Indian Towing v. United States*, 350 U.S. 61, 64-5 (1955) the Supreme Court refused to allow the discretionary function exemption to lighthouse keepers whose negligent inspection of lighthouse facilities caused a ship to run aground. The Court of Appeals in the *Varig* and

Mascher cases stated that "[t]he duties undertaken by FAA inspectors are more like those of the lighthouse keepers in *Indian Towing* than those of the cabinet level secretaries in *Dalehite*." (82-1349 Pet. Cert. (Varig) App. A, 7a). In *United Scottish* and the *Varig* and *Mascher* cases, the government promulgated specific and exacting standards with which to determine compliance with certification procedures. The FAA's duties are mandatory on an operational level, not discretionary.

In *Harr v. United States*, 705 F.2d 500 (D.C. Cir. 1983), the court disallowed the use of the discretionary function exception to the FTCA. Plaintiff sought damages from the FAA for negligent denial of his pilot medical certification. The court concluded that Harr's allegations, if proved, would establish liability in that the certification involves duties prescribed by the FAA. The court explained that in applying the discretionary function exception, the specific medical licensing regulation would have to be examined to determine whether FAA officials were left with "a range of policy judgment as to whether to grant a license, or whether the officials are simply required to match these deficiencies against a clear medical standard." *Supra* at 502-3. The court held that the latter applied and that the FAA's duty to determine whether to grant the license did not involve a discretionary decision within the meaning of 28 U.S.C. § 2680(a).

Similarly, the FAA regulations used for certificating aircraft and alterations on aircraft were here examined by the Court of Appeals to determine whether officials had to make policy decisions or whether certification was granted against clear standards. The Court of Appeals found inspection to be mandatory to determine compliance and not a *discretionary* function within the meaning of 28 U.S.C. 2680(a). (82-1350 Pet. Cert. App. A, 5a).

IV. A NEGLIGENT INSPECTION DOES NOT FALL WITHIN THE MISREPRESENTATION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT

The United States argues that the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. 2680(h) bars recovery in this case even though the acts of the inspector were negligent. It suggests that the reasoning of the Court of Appeals herein was inconsistent with this Court's decision in *United States v. Neustadt*, 366 U.S. 696, 706 (1961).

The government's reliance is clearly misplaced. In a footnote at the end of the *Neustadt* opinion, the court indicated its holding would not relieve the government of liability in cases like *Indian Towing*, a case which the District Court on remand found "particularly significant as it applies to this case." (Reporters Transcript, page 61). The *Neustadt* court stated:

> Our conclusion neither conflicts with nor impairs the authority of *Indian Towing v. United States*, 350 U.S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not "arise out of . . . misrepresentation," any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation" in the generic sense of that word, but "so far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings." Prosser, *Torts*, Section 85, pages 702-703 (1941 Ed.).

Neustadt, supra at 706 n.26.

This same language from the *Neustadt* decision was quoted by the Court in *Ramirez v. United States*, 567 F.2d 854, 856-7 (9th Cir. 1977), *en banc*, where it was stated: "The misrepresentation exclusion presumably protects the United States from liability in those many situations where a private individual relied to his *economic detriment* upon the advice of a government official." (Emphasis added). The *Ramirez* decision went on to state that in a medical malpractice action the failure to warn of risks attendant to surgery as had been alleged by Ramirez did not constitute a misrepresentation within the meaning of the Federal Tort Claims Act. *Supra* at 856-7.

The distinction between actions of a *commercial* or *business* nature and those involving personal injury and death was stressed in *Green v. United States*, 629 F.2d 581, 585 (9th Cir. 1980) where the court stated:

> Though we recognize that the decisions in this area may not be fully reconcilable, our view of the misrepresentation exception is consistent with case law construing the provision. Where the plaintiffs' injuries were not commercial, as, for instance, in the airplane crash cases, e.g., *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967); *United Airlines Inc. v. Wiener*, 335 F.2d 379 (9th Cir.), cert. dismissed, 379 U.S. 951 (1964), and the medical services cases, e.g., *Ramirez, supra*; *Betesh v. United States*, 400 F. Supp. 238 (D.D.C. 1974), courts have generally ruled that the exception does not preclude claims based on the government's failure to inform. See also *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955). On the other hand, the exception has usually been held to bar claims for damages resulting from commercial decisions based on false or inadequate information. e.g., *Neustadt, supra*; *Preston, supra*; *Cargill, supra*;

Scanwell Laboratories v. United States, 251 F.2d 941, 947-48 (D.C. Cir. 1975).

In light of these cases and *Block v. Neal*, 103 S.Ct. 1089 (1983), the Court of Appeals' decision is clearly correct. (82-1350 Pet. Cert. App. A, 4a-5a; 82-1349 Pet. Cert. (Varig) App. A, 6a). The Court of Appeals found respondents' claims to be grounded in negligence "rather than from any ensuing misrepresentation contained in the resultant certificate."

The *Block v. Neal* case reiterates that respondents' cases are different from the type of misrepresentation referred to in *Neustadt*. In *Neustadt*, the gravamen of the action against the government was communication of misinformation upon which the recipient relied. This Court distinguished *Neustadt* from *Block* stating that "Neustadt alleged no injury that he would have suffered independently of his reliance on the erroneous appraisal." *Block* at 1093.

This Court stated further:

> Section 2680(h) relieves the government of tort liability for *pecuniary* injuries which are wholly attributable to reliance on the government's negligent misstatements. As a result, the statutory exception undoubtedly preserves sovereign immunity with respect to a broad range of government actions. But does not bar negligence actions which focus not on the government's failure to use due care in communicating information, but rather on the government's breach of a different duty.

Block, supra at 1093-4.

The facts in respondents' cases are similar to the facts in *Block* in that the Court of Appeals found that to prevail under the Good Samaritan Doctrine, plaintiffs must show a voluntary undertaking to supervise inspection; that the official failed to use due care in carrying out

their supervisory activity; and that some injury was proximately caused by the official's failure to use due care.

In discussing FmHA's duty to use due care, this court stated that this duty was "distinct from any duty to use due care in communicating information to respondent." In footnote five of the *Block* decision, this distinction was made clear.

> 5. The Court distinguished negligent misrepresentation from the "many familiar forms of negligent misconduct [which] may be said to involve an element of "misrepresentation," [only] in the generic sense of that word." 366 U.S., at 711, n.26, 81 S.Ct., at 1302, n.26. *The "misrepresentation" exception applies only when the action itself falls within the commonly understood definition of a misrepresentation claim, which "has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings."* (Emphasis added) *Id.* quoting W. Prosser, Torts § 85, at 702-703 (1941 ed.). Thus, the claim in *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), for damages to a vessel which ran aground due to the Coast Guard's alleged negligence in maintaining a lighthouse, did not "aris[e] out of . . . misrepresentation" within the meaning of § 2680(h).

Block, supra at 1093.

The "partial overlap" of a negligence claim and a misrepresentation claim will not preclude the negligence claim if the misrepresentation claim is excepted under the Tort Claims Act. This court stated further:

> Neither the language nor history of the Act suggest that when one aspect of the government's conduct is not actionable under the "misrepresentation" exception a claimant is barred from pursuing a distinct claim arising out of other aspects of the govern-

ment's conduct. *Any other interpretation would encourage the government to shield itself completely from tort liability by adding misrepresentations to whatever otherwise actionable torts it commits.* (Emphasis added).

Block at 1094.

CONCLUSION

The deaths and damages which give rise to these cases were contributed to by the negligence of an employee of the FAA in performing a routine mandatory inspection of an alteration of an aircraft that later crashed and burned. Such routine inspections are carried out at the operational level rather than the policy level. The inspector has no discretionary function to perform but must determine whether the inspected aircraft complies with mandatory standards. This conduct is not shielded from liability by the discretionary function exception to the Federal Tort Claims Act.

The cases also do not fall within the misrepresentation exception to the FTCA. The conduct complained of consisted not of the issuance of the airworthiness certificate but of the negligent inspection which would have been one of the causes of the injuries suffered herein even if no certificate had ever been issued.

The government did not have to enter the field of aircraft regulation. Even after the decision had been made to regulate aircraft manufacture, inspection and alteration the FAA did not have to pass most of the existing Federal Air Regulations. It could have left all inspection in the hands of private persons who would be responsible to anyone injured by their negligence. Having taken over these functions and after deciding to have them performed by governmental personnel the government must be held to the same standard as those private persons would be, the exercise of reasonable care. Of course, the government will retain all of the defenses a private per-

son might have had and plaintiffs must prove negligence and causation, as they have here.

Whether the cases are analyzed within the Good Samaritan Doctrine or merely as cases of liability for breach of duty based on federal statutes and regulations the result should be the same. In that the negligence of a government employee caused the damages herein, the government should be liable.

The judgments should be affirmed.

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